APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2026 September Term, 1981

ARCHIE PELTZMAN,
Petitioner

v.

Federal Maritime Commission,
Respondent

Maritime Service Committee, et al.,
Central Gulf Lines,
Pacific Maritime Association,
American Maritime Association,
National Maritime Union of America,
Intervenors

BEFORE:
Tamm*, Ginsburg and Bork, Circuit Judges

ORDER

Upon consideration of respondent's motion for summary affirmance, and of the responses thereto, it is

Ordered by the Court that the motion for summary affirmance is granted. The Federal Maritime Commission has no jurisdiction under section 15 of the Shipping

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*Circuit Judge Tamm did not participate in this order.

Act, 46, U.S.C. Sec. 814, over the union security clause in collective bargaining agreements, as such clauses fall within the nonstatutory labor exemption to section 15 jurisdiction. See United Stevedore Corp. v. Boston Shipping Ass'n., 16 FMC 7 (1962). Petitioner's complaint further failed to state a cause of action under sections 16 and 17 of the Shipping Act, 46 U.S.C. sections 816 and 816.

Per Curiam

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

FILED MAR.29, 1982

GEORGE A. FISHER
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

o. 81-2026 September Term, 1981

rchie Peltzman,
Petitioner

v.

'ederal Maritime Commission,
Respondent

Maritime Service Committee, et al.,
Central Gulf Lines,
Pacific Maritime Association,
American Maritime Association,
National Maritime Union of America,
Intervenors

BEFORE: Ginsburg and Bork, Circuit Judges

ORDER

On consideration of petitioner's petition for rehearing, filed April 19, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

Filed:

May 19, 1982

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: S/Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2026 September Term, 1981

Archie Peltzman,
Petitioner

v.

Federal Maritime Commission,
Respondent

Maritime Service Committee, et al.,
Central Gulf Lines,
Pacific Maritime Association,
American Maritime Association,
National Maritime Union of America,
Intervenors

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

Petitioner's suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
George A. Fisher, clerk
BY: S/Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Filed:
May 19, 1982

(S E R V E D)
(MARCH 13, 1981)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

March 10, 1981

NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

DISMISSAL OF COMPLAINT

Complainant, Archie Peltzman, a "Marine Radio Officer," charges some 185 entities with depriving him of employment on certain vessels through "monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Association." Some of the respondents are named in the body of the complaint while the remainder are designated in four appendices to the complaint. Those named in the complaint appear to be the principal respondents and they are:

The American Maritime Association (AMA) and the Pacific Maritime Association (PMA) which are "the employers collective bargaining representatives,

negotiating on behalf of the employers with the American Radio Association, and the Radio Officers Union and with other seamen's unions in the maritime industry for wages, pensions, and other benefits to be paid seamen employed on the vessels listed in Annex A, B, C" to the complaint.

The American Radio Association (ARA) and the Radio Officers Union (ROU) are both unions, which together represent "over ninety percent of the Marine Radio Officers in the maritime industry thereby controlling the entrance and continuity of employment in the trade by the restrictive hiring hall agreements negotiated with AMA and PMA." According to Mr. Peltzman, all "Radio Officers are hired through union hiring halls and continuity of employment is controlled by the restrictive 'closed shop' agreements with AMA and PMA."

The "American Federation of Labor-CIO (AFL-CIO) which is an association which has unions in the maritime field. . . ."

The remaining respondents are according to Mr. Peltzman "common carriers by water" subject to the Shipping Act "which have bargaining agreements with the unions and associations already named or with others named in appendix D to the complaint."

Mr. Peltzman states that the case "arises under section 15 of the Shipping Act, 1916, as amended" and recites the events leading up to the filing of the complaint as follows: 1/

"From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU and did not file the agreements

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1/ The numbers preceding the paragraphs in the complaint have been omitted. No other editorial changes have been made.

negotiated with the other maritime unions affiliated with the American Federation of Labor-CIO.

"In 1978 PMA filed an agreement with ARA which the Commission on August 18, 1978, granted a temporary exemption, which the complainant by telegram on November 30, 1978, and later by a letter giving reasons for such protest. PMA sought either approval pursuant to section 15 of the Act or exemption therefrom.

"AMA and PMA control and determine the amount to be assessed to each shipping company for the various funds of the unions, for the benefit of the individual shipping company employees as provided under the collective bargaining agreement with the unions in the maritime industry.

"Pursuant to the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices and tenure of employment for 'union members' only, the complainant and other seamen similarly situated have been subjected to prejudice and disadvantage in violation of Section 16 of the Act, (B) constituted unjust and unreasonable regulations and practices in violation of section 17 of the Act, and (C) cause the agreement to be unjustly discriminatory and unfair as between 'members' of the unions and 'permit card members,' all to the detriment of the commerce of the United States, and to be contrary to the public interest in violation of section 15 of the Act, and to the public policy of the Government as expressed in the Taft-Hartley Act, Landrum-Griffin Act, and the Norris Laguardia Act. Similarly the statutes enacted for the protection of seamen in Title 46 have been nullified by the bargaining agreement.

"This complaint is not directed to the amounts of wages or benefits which are agreed to be paid seamen under the agreement. This complaint is

directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall agreements, and 'union' membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to 'join' a union or be discharged from employment if they do not 'join' a union which has an exclusive preferential hiring hall agreement, commonly called a pre-hire, or closed shop agreement, requiring membership as a condition of employment or referral by a union as a condition of employment.

"AMA and PMA are controlled by the shipping companies listed in Annex A, B, C. When raises and other benefits are negotiated the Maritime Administration pays the shipping companies a subsidy to cover these raises in pay and other benefits. This is done by the Government in order to strengthen and keep the Merchant Marine ready for any emergency, and to provide this country with commercial carriers to compete in world trade with foreign vessels, and to have a sufficient supply of seamen to man those vessels.

"AMA and PMA and some independent shipping companies have caused the seamen who are not 'union' members to be deprived of the benefits negotiated on their behalf, and thereby treated those seamen discriminatorily by discharging 'non-union' employees, and offering only temporary employment to 'non-union' employees.

"Seamen employed by the bargaining agreement are employed on an industry wide basis, and the benefits of the agreement in respect to entry in the trade, continuity of employment, health welfare, vacation, and pension benefits are restricted to 'union members' to the detriment of the complainant and those similarly situated who are not 'union members.'

"By way of illustration complainant was discharged from his employment as a Radio Officer on a Central Gulf Lines vessel, because of a lack of 'clearance' from the American Radio Association, thereby violating not only his 'permanent' assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he had accumulated in three and one half years of employment in the trade.

"Many Captains, Mates and Radio Officers of the American Export Lines were discharged because non-membership in the unions that Farrell Lines had a bargaining agreement with when Farrell Lines bought the American Export Line vessels.

"Radio Officers of the Prudential Steamship Company lost their jobs when Farrell Lines bought those ships and required those American Radio Association members to join the Radio Officers Union or be discharged.

"Unlicensed seamen on National Maritime Union and Seafarers Union contract ships have been discharged and refused referral from the exclusive preferential hiring halls of these unions. Likewise seamen have been prevented from entering the trade because of the closed shop, pre-hire agreements in the maritime industry.

"Respondents and the ARA and ROU unions have received subsidy payments from the Maritime Administration and have been unjustly enriched to the detriment of complainant and other seamen similarly situated in violation of the Shipping Act and seamen's statutes protecting seamen in their employment and entrance into the trade."

On the basis of the foregoing, Mr. Peltzman prays that the Commission (1) "declare that the bargaining agreements which were not filed until 1978

were illegal and could not be enforced against complainant and other seamen similary situated before the agreement was filed and approved," (2) award reparations "retroactive from the date of discharge of complainant from the Central Gulf Lines vessel to the present, and continuing until rehired by Central Gulf Lines or triple damages because of the violation of the anti-trust laws relating to monopoly in employment, . . ." and (3) determine "that insofar as the agreements call for an exclusive pre-hire preferential hiring hall referral system," and " union membership" as a condition of employment, the agreements, unless modified are unlawful and may not be approved. Finally Mr. Peltzman prays "that the Commission investigate the illegal hiring hall and training facilities in the maritime industry which are subsidized by the Maritime Administration, and order that the agreements be modified so as to conform to the requirements of sections 15, 16 and 17 of the Act."

Before dealing with the merits of the various motions now before me, a summary of what one respondent has called Mr. Peltzman's "legal odyssey" is necessary to any understanding of the complaint in this case. The facts set forth below are taken from an unchallenged affidavit of Mr. C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal courts. Official notice is taken of those decisions and orders pursuant to Rule 226 of the Commission's Rules of Practice and Procedure. The affidavit, orders and decisions can be found in the Appendix to Central Gulf's Motion to Dismiss Complaint.

Mr. Peltzman was first employed by Central Gulf in May 1970 as a radio operator on the *SS Green Ridge* and completed three voyages aboard the vessel. Then and since, Central Gulf employed radio operators on its vessels under agreements with the American Radio Association, a union of radio operators. 2/ All of these agreements contained a "union security clause" which provides:

> (b) The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring.

In May 1971, the Association advised Central Gulf that Mr. Peltzman had not paid his union initiation fees and on May 28, 1971, Central Gulf told Mr. Peltzman that because of its agreement with the Association, he would "not be able to rejoin the vessel without prior clearance from the union." In September of 1971, Mr. Peltzman filed charges with the National Labor Relations Board (NLRB) alleging that the union's refusal to clear him for employment on a central Gulf vessel and Central Gulf's subsequent refusal to employ him were unfair labor practices in violation of the National Labor Relations Act. He also charged the union with violating the National Labor Relations Act because of the Union's refusal to enroll him in "the industry school," which refusal was allegedly based solely on the fact that Mr. Peltzman was not a union member.

On October 26, 1971, the NLRB's Region 2 found Mr. Peltzman's charges to be without merit saying:

2/ The current agreement between Central Gulf and the Association became effective June 16, 1978, and expires June 15, 1981. There have been and there are now no other agreements between Central Gulf and anyone else concerning the employment of radio operators.

> The evidence does not tend to establish that the . . . Union violated the National Labor Relations Act. The evidence establishes that pursuant to a valid Union security agreement you were obligated to pay an initiation fee to the Union which you refused to do after notification by the Union that such fees were due. Under such circumstances the refusal by the Union to refer you to your former permanent position aboard the *S.S. Green Ridge* was permissible.
>
> Insofar as the charge alleges that you were not enrolled in the industry school because of your lack of membership in the Union, the evidence does not support such claims, inasmuch as you failed to qualify for admission to the course for which you sought enrollment and admission to the school is not limited to Union members. (Central Gulf Appendix, page 8.)

The findings of Region 2 were confirmed by the NLRB's General Counsel and Mr. Peltzman's appeals from those decisions were unsuccessful. (*Peltzman v. NLRB*, 2d Cir., Dkt. No. 70-1091, unreported orders of dismissal and rehearing contained in Central Gulf Appendix pages 15 and 16; *certiorari denied*, 409 U.S. 887; *rehearing denied*, 409 U.S. 1050.)

It appears that at the same time Mr. Peltzman was seeking relief from the NLRB, he was pursuing other remedies in the courts of New York State where he sought to enjoin the union and collect damages for the termination of his employment on Central Gulf vessels. These actions were dismissed because the subject matter was within the exclusive jurisdiction of the NLRB. *Peltzman v. American Radio Association*, 69 Misc. 2nd 17, 327 N.Y. Supp. 2d 505 (1971); *affirmed*, 40 A.D. 2d 631 (N.Y. Supp. Ct. App. Division 1971), 335 N.Y. Supp. 2d 998 (1971); *Certiorari denied*, 411 U.S. 916; *rehearing denied*, 411 U.S. 977 (1973).

Having been turned down by the NLRB and the New York courts, Mr. Peltzman then filed suit against Central Gulf in the United States District Court for the Southern District of New York but again the result was the same with the

Supreme Court denying rehearing in 1976.[3/] The gravamen of Mr. Peltzman's action in the District Court was described by the Court of Appeals as consisting of ". . . a myriad of claims . . . based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement. . . ." The Court disposed of the claims saying:

> Most of Peltzman's arguments can be dealt with summarily. Nothing in maritime law renders illegal a discharge that is authorized under a legitimate union security clause. There is no colorable basis for an antitrust claim. The security clause here is not subject to attack under the federal or New York constitutions . . . And any claim that the company committed an unfair labor practice in discharging him would plainly be subject to the exclusive jurisdiction of the NLRB.

The record does not disclose what other actions, if any, Mr. Peltzman might have taken during the period from 1976 when the Supreme Court last denied rehearing to October of last year when he filed this complaint with the Commission. Motions to dismiss Mr. Peltzman's complaint have been filed by or on behalf of virtually every respondent in the case. The arguments for dismissal run from the complaint being barred through lack of jurisdiction over some of the respondents to failure to state a cause of action.

Before getting to the merits of the various substantive grounds for dismissal a word or two should be said about a procedural ground which has

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3/ *Peltzman v. Central Gulf Lines, Inc.*, 86LRRM2127, ___ F. Supp. ___ (SDNY 1974); *affirmed in part and remanded for a single fact determination*, 497 F 2d 332 (2d Cir. 1974) *decision on remand* 88LRRM2924, ___ F. Supp. ___ (SDNY 1974), not officially reported; affirmed, 523 F.2d 96 (2nd Cir. 1975) *certiorari denied*, 423 U.S. 1974; rehearing denied, 424 U.S. 979 (1976). These decisions can be found in the Central Gulf Appendix pages 17-26.

been argued by a number of respondents, i.e. that the complaint fails to meet the requirements of Rule 62 of the Commission's Rules of Practice and Procedure. That rule requires that complaints contain, (1) a concise statement of the cause of action, (2) a request for relief or other affirmative action sought, and (3) identification of ports of origin and destination and other particulars of shipments when reparations are sought. The main thrust of the procedural argument is that the complaint utterly fails to concisely state the cause of action--the complaint is so confusingly drafted that respondents are virtually reduced to divination to find what violations they are charged with.

Mr. Peltzman, who is appearing without counsel, has, it must be admitted, been somewhat less than lucid in stating his grievance. However, the various motions to dismiss demonstrate that the respondents have little doubt as to the precise nature of Mr Peltzman's charges. Moreover, were the complaint defective for its lack of clarity, the appropriate remedy would not be dismissal but leave to amend.

Two statements in the complaint provide the key to the nature of Mr. Peltzman's grievance. First Mr. Peltzman describes himself as a "Marine Radio Officer . . . who has been deprived of employment on [certain] vessels . . . due to the monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Assn. with the American Radio Association, and the Radio Officers Union." And later in the complaint Mr. Peltzman states, "This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and union membership requirement in the

agreement which is placed on seamen who to enter the service of shipping companies, and who wish to retain those jobs without being forced to join a union or be discharged from employment if they do not join a union which has an exclusive preferential hiring hall agreement, commonly called a prehire or closed shop agreement. . . ."

From this it is clear that the real grievance of Mr. Peltzman is the requirement that he join a union before he can be employed as a radio officer on the vessels of those shipping companies which have union contracts containing closed shop or union security clauses. It is equally clear that Mr. Peltzman feels that the Commission's jurisdiction over this grievance is to be found in section 15 of the Shipping Act.[4/] Mr. Peltzman is also aware that since 1968, the Commission has exercised jurisdiction, albeit expressly limited, over some provisions of collective bargaining agreements for in a reply to the motions to dismiss he cites *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).[5/] Thus the question becomes does or can whatever jurisdiction the Commission has or had over labor-management agreements extend to provisions which establish union membership as a condition precedent to employment as a radio officer in the U. S. Merchant Marine. While it is unnecessary to review the complete history of the Commission's involvement in labor agreements, some

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4/ In paragraph 9 of his complaint Mr. Peltzman states, "This proceeding arises under Section 15 of the Shipping Act, 1916, as amended, 46 USC Sec. 814."

5/ Mr. Peltzman cites *Volkswagen, supra*, solely for the proposition "that the public interest is violated by this type of agreement," i.e. closed shop.

consideration of the leading cases is necessary to show just why Mr. Peltzman's complaint is without the Commission's jurisdiction.

In 1965 the Commission issued its decision in *Volkswagenwerk Aktiengesellschaft v. Marine Terminals*, 9 F.M.C. 77. Volkswagen's complaint in that case charged that the agreement between members of the Pacific Maritime Association (PMA) establishing the method of assessing cargoes for contributions to pay their obligations under an agreement with the International Longshoremen's and Warehousemen's Union (ILWU) violated section 15 of the Shipping Act.[6/]

In 1960 the ILWU agreed to the introduction of labor saving devices and the elimination of certain restrictive work practices. In return the PMA agreed to create a $29,000,000 "Mechanization and Modernization Fund" to be used to mitigate the impact upon employees of technological unemployment. The agreement specifically reserved to the PMA alone the right to determine how to raise the Fund from its members. PMA decided to raise the money for the fund by an assessment on each revenue ton of cargo handled.

Volkswagen in its action before the Commission charged that the method of allocating the assessment was discriminatory as applied to its automobiles and that the agreement itself was unenforceable because it had not been filed with or approved by the Commission under section 15 of the Shipping Act. The

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6/ PMA is an employer organization of some 120 principal common carriers by water, stevedoring contractors and marine terminal operators representing the Pacific Coast shipping industry. The primary function of PMA is to negotiate and administer collective bargaining agreements with unions representing its member's employees of which the ILWU is one.

Commission dismissed the complaint concluding it was not the kind that required filing under section 15. The Court of Appeals affirmed the Commission and the case then went to the Supreme Court. The Supreme Court reversed the Commission finding that the agreement did fall within the ambit of section 15 and after reaching their conclusion the Court went on to say:

> It is to be emphasized that the only agreement involved in this case is the one among members of the Association [PMA] allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of section 15. Those agreements reflecting the national labor policy of free collective bargaining by respresentatives of the parties own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiation with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement affecting only relationships among Association members and their customers, is all that there is before us in this case.

Several points are clear from the Court's decision: (1) the agreement in question was between persons subject to the Act, (2) the agreement has a direct impact upon persons protected by the Act, i.e. shippers, and (3) the agreement was not a collective bargaining agreement reflecting the national labor policy which is the exclusive concern of the NLRB. The Supreme Court's decision in Volkswagen faced the Commission with the problem of "reconciling or accommodating Shipping Act policies with labor act policies." The Commission dealt with the problem in *United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7 (1972). In that case, the Commission decided to apply the so-called "labor exemption" to certain agreements which might otherwise fall under section 15.

The labor exemption was created as a means of accommodating the national policies embodied in the antitrust laws and the labor laws. The labor exemption rendered "pure" collective bargaining agreements immune from attack under the antitrust laws. The Commission found the analogy to a labor exemption from the shipping laws "obvious," and after a review of the leading cases on the labor exemption from the antitrust laws, the Commission developed the following criteria to be used in granting "labor related" agreements a labor exemption from the "shipping laws":

> 1. The collective bargaining agreement which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball."
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> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
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> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
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> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management. (16 F.M.C. 13).

Application of these criteria to the agreements Mr. Peltzman says violate the Shipping Act clearly demonstrates that the agreements come under the labor exemption and thus are immune from challenge under the Shipping Act. 7/

7/ Mr. Peltzman refers to only two agreements with anything approaching specificity--"From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU. . . ." There are a number of unclear references to other "agreements."

First, there is no allegation that the agreements were not the product of "arms length" or "eyeball to eyeball" bargaining.

Second, the challenged provisions are mandatory bargaining subjects. *NLRB v. General Motors*, 373 U.S. 734 (1963); *Oneita Knitting Mills v. NLRB*, 375 F2d 385 (4th Cir. 1967). "Closed shop" or union security clauses are proper union concerns and are primarily and commonly associated with a bona fide labor purpose.

Third, the result of the challenged clause in the collective bargaining agreements does not impose terms on entities outside the bargaining group which are protected by or subject to the provisions of the Shipping Act.

Fourth, there is no allegation that the unions were or are acting at the behest or in combination with nonlabor groups, i.e. there is no conspiracy with management. Even if a conspiracy were alleged it would of necessity deal with matters which are the exclusive concern of the NLRB and beyond the jurisdiction of the Federal Maritime Commission.

Thus, since at least 1972, the allegedly unlawful agreements have or would if challenged, been exempt from and therefore immune to any attack under section 15 of the Shipping Act, 1916. In other words, since at least 1972, the labor exemption has applied to agreements of the kind challenged by Mr. Peltzman and the Commission since then has lacked jurisdiction over the subject matter of those agreements.

Mr. Peltzman also alleges that the agreements violate section 16 and 17 of the Act.[8/] Section 16 First provides:

8/ It must be assumed that Mr. Peltzman is relying on section 16 First since no other section is even remotely applicable to the complaint.

> It shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
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> To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (46 U.S.C. 815).

Though broadly worded, section 16 is clearly directed to the obligations of common carriers and other persons subject to the act to users of their services, i.e., the shipping public. See e.g. *Armstrong Cork Co. v. American Hawaiian SS Co.*, 1 U.S.M.C. 719 (1938); *Huber Mfg. Co. v. N.V. Stoomvart "Nederland,"* 4 F.M.B. 343, 347 (1953); *Afghan-American Trading Co. v. Isbrandtsen Co.*, 3 F.M.B. 622, 623 (1951); *Port of New York Authority v. AB Svenska*, 4 F.M.B. 202, 205 (1953); and *Pittston Stevedoring Corp. v. New Haven Terminal Inc.*, 13 F.M.C. 33, 35 (1969). Mr. Peltzman's charge is that he has been subjected to "prejudice and disadvantage in violation of section 16" because of the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices and tenure of employment for 'union members' only. . . ." It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First—a section which was not intended to deal with offenses alleged.

Mr. Peltzman alleges that closed shop or union security clauses in bargaining agreements "constitute unjust and unreasonable regulations and practices in violation of Section 17 of the Act, and cause the agreement to

be unjustly discriminatory as between 'members' of the union and 'permit card members'. . . ." A simple reading of the language of section 17 shows that it has no applicability to the grievances of Mr. Peltzman.

The regulations and practices which section 17 requires to be just and reasonable are those "relating to or connected with the receiving, handling, storing or delivery of property." They clearly do not apply to the terms and conditions under which a common carrier will employ a "radio officer." The unjust discrimination forbidden by section 17 is discrimination in rates between shippers and ports. Again a condition not even remotely concerned with the employment of radio officers.

Finally, the complaint is time-barred by the two-year period of limitation in section 22 of the Act. The single allegation of harm is contained in paragraph 21 of the complaint where Mr. Peltzman says:

> . . . complainant was discharged from his employment as a Radio Officer on a Central Gulf Line vessel, because of lack of "clearance" from the American Radio Association, thereby violating not only his "permanent" assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he accumulated in his three and one half years of employment in the trade.

The record demonstrates that the discharge Mr. Peltzman is referring to took place in 1971.[9/] Mr. Peltzman's cause of action, if he had one, arose with his "discharge from employment" in May of 1971 when Central Gulf terminated

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9/ See affidavit of C. S. Larsen and the decisions in *Peltzman v. Central Gulf Lines Inc.*, 497 F2d 332 (CA2, 1974); *Peltzman v. NLRB*, 409 U.S. 877, *reh. denied*, 409 U.S. 1050; *Peltzman v. American Radio Assoc.*, 327 N.Y. Supp. 2d 505 (1971), *affirmed* 40 A.D. 2d 631 (N.Y. Sup. Ct. App. Div. 1971); 335 N.Y. Supp. 2d 998 (1971) (App 35); cert. denied 441 U.S. 916 (1973), *reh. den.* 411 U.S. 977(1973).

his employment because of Peltzman's refusal to pay his union initiation fees. Additionally in a letter reply to some of the motions to dismiss Mr. Peltzman argued that the motions "do not reach the thrust or substantive allegations in the complaint which allege in essence:

> 1. Illegal bargaining agreements not filed by the defendants in violation of the Shipping Act from 1948 to 1977.

Again this alleged violation is time-barred by section 22 of the Act.

The complaint of Mr. Archie Peltzman fails to state a casue of action upon which relief can be granted and is time barred. The complaint is dismissed.

John E. Cograve
Administrative Law Judge

FEDERAL MARITIME COMMISSION

(S E R V E D
(AUGUST 12, 1981
(FEDERAL MARITIME COMMISSIO

DOCKET NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

ORDER ADOPTING DISMISSAL OF COMPLAINT

This proceeding was initiated as a result of a Complaint filed by Archie Peltzman against the American Maritime Association (AMA), the Pacific Maritime Association (PMA), and the individual members of these Associations who are common carriers by water or "other persons subject to the Act" within the meaning of section 1, Shipping Act, 1916 (46 U.S.C. 801) (the Act).1/ Also named in the Complaint are several unions as well as a number of independent shipping companies. In all, the Complaint names some 185 entities alleged to have violated sections 15, 16 and 17 of the Act (46 U.S.C. 814, 815, 816), as well as the antitrust laws and numerous labor statutes. These violations are said to have resulted from the "union security clauses" of certain unspecified collective bargaining agreements which were allegedly neither filed with, nor

1/ This proceeding was initiated prior to the effective date of the Maritime Labor Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021, which modified the Commission's jurisdiction over activities flowing from collective bargaining agreements.

approved by, the Commission and which allegedly deprived Complainant of employment as a radio operator on Respondents' vessels (Complaint, paragraphs 13, 14, 16, 17 and 21). Complainant requests that the Commission declare the agreements unlawful and seeks reparation under the Act or treble damages under the antitrust laws. Complainant also urges the Commission to investigate the hiring hall and maritime training facilities that are subsidized by the United States Maritime Administration.

This proceeding is now before the Commission upon Petition for Reconsideration filed by Complainant to the ruling of Chief Administrative Law Judge John E. Cograve dismissing the Complaint.[2/] Replies to the Petition have been filed by or on behalf of most of the Respondents in the proceeding.

DISCUSSION

In his Order dismissing the Complaint, the Presiding Officer concluded that Complainant had failed to state a cause of action upon which relief could be granted and that, in any event, the Complaint is barred by the two-year statute of limitations in section 22 of the Act (46 U.S.C. 821). The Presiding Officer first found that the agreements complained

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2/ Mr. Peltzman is appearing pro se. His Petition, though captioned as one for "reconsideration," is being treated as an appeal pursuant to Rule 227(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(b)). This Rule permits a party to seek Commission review of an administrative law judge's grant of a motion to dismiss a proceeding in whole or in part.

of, at least as they extend "to provisions which establish union membership as a condition precedent to employment as a radio operator in the U.S. Merchant Marine," are labor-exempt under the criteria established in United Stevedoring Corporation v. Boston Shipping Association, 16 F.M.C. / (1972) (BSA), and "thus are immune from challenge under the Shipping Act" (Order at 11 & 14).3/

Further, the Presiding Officer determined that section 16 of the Act is not intended to address the Complainant's allegation regarding "unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and 'union' membership requirement in the agreements which is placed on seamen who wish to enter the service of shipping companies" (Order at 4 and 16; Complaint paragraph 17). The Presiding Officer explained that although section 16 is broadly worded, it is "clearly directed to the obligations of common carriers and other persons subject to the Act to users of their services, i.e. the shipping public" rather than to an employee's grievance against an employer and the union. He also noted that it would be "absurd" to recognize a "labor exemption" under BSA to reconcile conflicting labor and shipping policies on the one hand and to undermine that exemption by taking

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3/ It was unnecessary for the Presiding Officer to have considered other provisions of the collective bargaining agreements because they were not put in issue. Accordingly, the Commission will not adopt that portion of the Order which implies that the Agreements are exempt in their entirety (see Discussion, infra).

jurisdiction under section 16 - "a section which was not intended to deal with offenses alleged" (Order at 16) on the other.

Section 17 of the Act was likewise found to be inapplicable to the charges advanced in the Complaint. The Presiding Officer ruled that the regulations and practices which section 17 requires to be reasonable relate to receiving and handling property and not to the terms and conditions of a radio officer's employment by a common carrier by water (Order at 17).

In concluding that the Complaint is, in any event, barred by the two-year statute of limitations, the Presiding Officer relied on the affidavit of C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal Courts. The Presiding Officer found that Mr. Peltzman's cause of action, if any, arose from his "discharge from employment" in May of 1971 when Central Gulf terminated his employment because of a refusal to pay union initiation fees (Order at 17).

Complainant appeals from the Presiding Officer's dismissal on essentially five grounds:

(1) the Presiding Officer applied an erroneous standard in considering the alleged violations of the Shipping Act;

(2) the Presiding Officer committed procedural errors;

(3) the Presiding Officer committed factual errors;

(4) the Presiding Officer failed to consider all of the Respondents' pleadings and arguments; and

(5) the Presiding Officer erred in finding that the Complaint is time-barred.

The Complainant argues that the "union security" provisions of the agreements complained of are illegal restraints of trade and are therefore contrary to the public interest and must be investigated by the Commission. Complainant maintains that the purpose of the Shipping Act, 1916, and related statutes is not only to assure a strong merchant marine but also to protect merchant seamen. He further submits that the Commission may not approve an agreement under the public interest standard of section 15 if it violates either labor statutes or the antitrust laws.

Complainant also argues that the Presiding Officer erred in failing to convene a prehearing conference or any hearings in this proceeding, in dismissing the Complaint prior to the receipt of all the Respondents' answers thereto, and in not specifically considering and addressing all of his pleadings and arguments.

Mr. Peltzman further contends that the Presiding Officer's finding that the Larsen affidavit went unchallenged is erroneous. This affidavit was allegedly rebutted in Complainant's December 5, 1980 Reply to the Motions to Dismiss. The Presiding Officer also allegedly erred in stating that Complainant had cited Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968), as an indication that Complainant was cognizant of the Commission's jurisdiction over matters arising out of collective bargaining agreements. Finally, Mr. Peltzman contends that his Complaint is not time-barred because,

although he was discharged in 1971, the "illegal closed shop and restrictive hiring hall practices are still continuing."4/ (Petition at 9).

The several Respondents replying to Complainant's appeal all urge the Commission to deny the appeal and to affirm the Presiding Officer's dismissal.

Complainant's appeal presents the Commission with no reason for setting aside the Presiding Officer's ruling. The Presiding Officer's ultimate conclusions are well-reasoned and are supportable procedurally and in law and fact. The Order of Dismissal is therefore adopted by the Commission, subject to the modifications and clarifications discussed below. The Commission shall, however, first dispose of certain procedural challenges.

Rule 64 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.64, provides that answers to complaints shall be filed within 20 days of the service of the complaint, unless a motion to dismiss the complaint is filed. This Rule further states that the answer to the complaint need

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4/ The provisions or agreements at issue here have been variously referred to by the parties as "closed shop" or "union security" provisions. The various tribunals where Mr. Peltzman has sought relief have characterized the provisions complained of as "union security" provisions (see for example Peltzman v. Central Gulf Lines, Inc., 86 L.R.R.M. 2127 (1974) and footnote 7, infra). They are so referred to in this Order.

not be filed until such motion has been denied. Complainant did not request relief as provided for in Rule 64, has not demonstrated how he was harmed by the failure of any Respondent to timely answer his Complaint, nor has the Commission been able to perceive any harm accruing from failure by any Respondent to timely answer Mr. Peltzman's Complaint.[5/] The Commission therefore finds that if any such failure existed, it constituted harmless error, particularly in light of the Commission's ultimate disposition of the Complaint.

Similarly, Complainant has failed to establish how he was prejudiced by the absence of a pre-hearing conference or evidentiary hearings. The Commission Rules provide the Presiding Officer broad discretion in structuring the proceeding (See Rule 94, 46 C.F.R. 502.94). The Commission cannot find that the Presiding Officer abused that discretion. The disposition of this proceeding, on the basis of the Motions filed, turned on questions of law, thus obviating any need for evidentiary hearing procedures.

Finally, it is a well-settled principle that administrative decisions need not recite or respond to each and every argument or finding propounded by a party to a proceeding.[6/] The

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5/ The one Respondent alleged not to have filed an answer, the Seafarers International Union, filed its answer on November 24, 1980.

6/ See Mediterranean Pools Investigation, 9 F.M.C. 264, 267 (1966), citing NLRB v. State Center Warehouse and Cold Storage Company, 193 F.2d 156 (9th Cir. 1951); and NLRB v. Sharpless Chemicals, Inc., 209 F.2d 645 (6th Cir. 1954).

Presiding Officer's ruling in this proceeding addresses all the material matters raised by the pleadings.7/ The arguments that Complainant submits were not considered by the Presiding Officer relate primarily to the merits of his Complaint rather than the gravamen of the Motions to Dismiss, i.e., the lack of Commission subject matter jurisdiction and the failure to state a claim upon which relief can be granted.

It is the absence of subject matter jurisdiction and the failure to state a claim upon which relief can be granted which mandates the dismissal of the Complaint. The essence of the Complaint is that certain collective bargaining agreements or their provisions require membership in the union as a condition to employment on Respondent's vessels. (Order at 11). These "union security" agreements or provisions are at the heart of the Complaint. Despite sweeping statements concerning the unlawfulness of the collective bargaining agreements in their entirety, the focus of the Complaint is:

7/ The facts relied upon by the Presiding Officer are contained in the various decisions and orders of the National Labor Relations Board, and the Federal and New York State courts, as well as Mr. Larsen's affidavit. Commission Rule 226, 46 C.F.R. 502.226, permits the taking of official notice of these decisions, thus mooting any challenges to the Presiding Officer's consideration of Mr. Larsen's affidavit. In any event, the matters allegedly rebutted by Mr. Peltzman's December 5, 1980 Reply were not relied upon nor pertinent to the Presiding Officer's basis for dismissal. Similarly, the Commission perceives no harm in the Presiding Officer's misreference to Volkswagenwerk, supra, because he properly noted the proposition relied on in a footnote (Order at 11). Moreover, it is irrelevant to the matter at issue whether Complainant was in fact previously aware of the Commission's jurisdiction over collective bargaining agreements (Id.).

> . . . directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements . . . placed on seamen who wish to enter the service of shipping companies . . . [Emphasis supplied] (Complaint, paragraph 17).

Complainant's grievance therefore addresses pure employer-employee/union matters which are not cognizable under the Shipping Act.[8/] See New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F.2d 1215, 1220 (2d Cir.), cert. den. 419 U.S. 964 (1974). Cf. Federal Maritime Commission v. Pacific Maritime Association (PMA), 435 U.S. 40 (1978).[9/]

This agency's jurisdiction attaches to the provision of common carrier services in the domestic offshore and foreign ocean trades of the United States.[10/] Within the context of this proceeding, it is concerned with the regulation of common carriers subject to its jurisdiction, and not the

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8/ Such matters appear to fall within the province of the National Labor Relations Act.

9/ In PMA, the Supreme Court recognized that collective bargaining agreements could be subject to section 15 of the Shipping Act and found such an agreement so subject when it imposed terms relating to employer competition in providing transportation related services upon employers not members of a multi-employer bargaining unit.

10/ "The FMC has no concern with so much of [a collective bargaining agreement] as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters." New York Shipping Association, supra, at 1220.

individual seamen employed by those carriers.[11] The transportation activities of such carriers present Shipping Act considerations; their employment relationships, standing alone, do not.[12] It follows, therefore, that the Complaint does

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11/ This proceeding presents a factual situation far removed from the type of transportation practice growing out of collective bargaining agreements whereby carriers refuse to tender containers to certain classes of shippers or tender them only subject to additional charges, or from situations involving the imposition of charges by common carriers against the users of their transportation services to fund longshoremen's benefits, the usual situations in which our jurisdiction has come into play. See e.g. Volkswagenwerk v. FMC, 390 U.S. 261 (1968); New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F.2d 1215 (2nd Cir. 1974), cert. den., 419 U.S. 964 (1974); Transamerican Trailer Transport, Inc. v. FMC, 492 F.2d 617 (D.C. Cir. 1974); New York Shipping Ass'n v. FMC, 571 F.2d 1231 (D.C. Cir. 1978); New York Shipping Ass'n v. FMC, 628 F.2d 253 (D.C. Cir. 1980); United States v. Sea-Land Service, Inc., 424 F.Supp. 1008 (D.N.J. 1977), appeal dismissed, 577 F.2d 730 (3rd Cir. 1978) (table), cert. denied, 439 U.S. 1072 (1979); South Atlantic and Caribbean Line, Inc., 12 F.M.C. 237 (1969); Docket Nos. 73-17, Sea-Land Service, Inc. and Gulf Puerto Rico Line, Inc. - Proposed Rules on Containers and 74-40, Puerto Rico Maritime Shipping Authority - Proposed ILA Rules on Containers (June 14, 1978), pending appeal sub nom. CONASA and NYSA v. FMC and USA, D.C. Cir. No. 78-1776.

12/ In NAACP v. Federal Power Commission, 425 U.S. 662 (1976), the Supreme Court ruled on the applicability of the public interest standard of the Federal Power Act, 41 Stat. 1063, and the Natural Gas Act, 52 Stat. 821, to employment practices of the regulated industry. In rejecting the contention that the public interest criterion authorized the Federal Power Commission to "concern itself with discriminatory employment practices on the part of the companies it regulates," the Court explained:

> This Court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation.

[Footnote continued on next page].

not allege matters which, if true, would establish a violation of the Shipping Act, 1916. The Complaint must accordingly be dismissed as a matter of law.

The language of sections 16 and 17, even if broadly construed, could not be interpreted to apply to Complainant's grievance. The Commission will therefore adopt the Presiding Officer's disposition of these allegations with the following clarification. After concluding that the Complaint does not state a cause of action under section 16, the Presiding Officer noted that:

> It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First - a section which was not intended to deal with the offenses alleged. (Order at 16).

Notwithstanding the last modifying phrase, this statement could suggest that once a particular agreement is determined to be

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12/ [Footnote continued from preceding page.]

> For example, in the case of the Interstate Commerce Commission . . . the term "public interest" . . . is not a concept without ascertainable criteria but has a direct relation to the adequacy of transportation service . . . . (at 669, citations omitted).

The Court further stated:

> [I]t could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest" Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees. (at 671).

"labor exempt" from the filing and approval requirements of section 15, the activities contemplated by the agreement are also immune from other sections of the Shipping Act, 1916. This result is inconsistent not only with the BSA decision relied on by the Presiding Officer, but with court decisions indicating that action which is "labor exempt" from the reach of section 15 may nevertheless be subject to section 16 of the Act. See, e.g., Pacific Maritime Ass'n v. FMC, 543 F.2d 395, 410, 411, fn. 39 (D.C. Cir. 1976), reversed on other grounds sub nom. FMC v. Pacific Maritime Ass'n, 435 U.S. 40 (1978); FMC v. Pacific Maritime Ass'n, 435 U.S., supra, at 68, 74-75, 77 (dissent of Justice Powell). Accordingly, the Commission will not adopt the sentence quoted above from page 16 of the Order.

There is one final matter that warrants clarification. The Presiding Officer concluded that the Complaint is barred by the two-year statute of limitations in section 22 of the Act. The limitation in section 22, however, applies only to claims for reparation and does not act as a bar to requests for other relief. This fact is not significant here, however, because Complainant has not otherwise stated a claim upon which relief can be granted.

THEREFORE, IT IS ORDERED, That Complainant's Petition for Reconsideration is denied.

IT IS FURTHER ORDERED, That the March 13, 1981 Order of Dismissal in this proceeding is adopted by the Commission as modified and clarified above.

By the Commission.*

Francis C. Hurney
Secretary

*Chairman Green did not participate.

APPENDIX F

A. Section 15, Shipping Act, 1916 (29 U.S.C. Sec. 814)

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apporting earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in

any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different ...